

**DEPARTMENT OF STATE REVENUE****LETTER OF FINDINGS NUMBER: 00-00438****Sales and Use Tax  
For Tax Years 1997-1999**

NOTICE: Under Ind. Code § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

**ISSUES****I. Sales Tax—Repair and Service Contracts****Authority: IC § 6-2.5-2-1****45 IAC 2.2-4-2**

Taxpayer protests the assessment of sales tax on sales of parts and materials used in service repair jobs.

**II. Use Tax—Storage Tanks****Authority: IC § 6-2.5-3-2****45 IAC 2.2-3-4**

Taxpayer protests the assessment of use tax on petroleum storage tanks.

**III. Tax Administration—Penalty****Authority: IC § 6-8.1-10-2.1****45 IAC 15-11-2**

Taxpayer protests the imposition of the 10% negligence penalty.

**STATEMENT OF FACTS**

The taxpayer is primarily engaged in three separate businesses. Division 1 is a licensed motor fuel dealer and bulk plant. This division sells gasoline, diesel fuel, heating oil and propane gas to customers in Indiana and Ohio. Division 2 is a full service electrical contractor and electrical repair service. This division performs lump sum contracts for improvements to realty and general electrical repairs to homes, farms, and businesses. Division 3 also performs both lump sum contracts for improvements to realty and general repair for all makes and types of heating and air conditioning systems for residential, agricultural, industrial and other business customers. The transactions at issue involve Division 3's lump sum contracts for general repair for heating

and air conditioning systems. Taxpayer's business situs is located in Ohio; taxpayer conducts business in both Ohio and Indiana. An audit of taxpayer's business activities was conducted covering the tax years 1997 through 1999. The Department determined that taxpayer had neither billed nor collected sales tax from the sale of parts and materials used in its Indiana service repair jobs. The Department also determined that taxpayer had purchased exempt several petroleum storage tanks that were provided to several of their Indiana customers.

Taxpayer timely protested, and a hearing was scheduled for May 16, 2001. Taxpayer failed to appear. Therefore, this Letter of Findings is based on the information in the files, Indiana's tax code and administrative regulations, and relevant case law. Further information will be provided as necessary.

## **DISCUSSION**

### **I.     Sales and Use Tax—Repair and Service Contracts**

Taxpayer protests the assessment of sales tax on the sale of parts and materials used in its Indiana repair jobs. Taxpayer contends "repair of furnaces, air conditioners, etc." constitutes "an improvement to real estate" such that taxpayer may bill customers for repairs on a lump sum basis. Denomination as a lump sum contract allows taxpayer to self-assess use tax on materials purchased instead of collecting sales tax on the materials transferred.

Contractors may bill customers on a "lump sum" basis. (45 IAC 2.2-4-23). A contractor is defined as "any person engaged in converting construction material into realty." Furthermore, "the term 'contractor' refers to general or prime contractors, subcontractors, and specialty contractors, including. . .persons engaged in. . .plumbing, *heating*, electrical work. . ." (45 IAC 2.2-4-25, emphasis added). Taxpayer, therefore, is acting as a contractor—and may execute lump sum contracts—when installing heating and air conditioning units. However, taxpayer is not acting as a contractor when servicing and repairing such units. Rather, taxpayer is properly characterized as a service provider.

Generally, "persons engaging in repair services are servicemen with respect to the services which they render and retail merchants at retail with respect to repair or replacement parts." (45 IAC 2.2-4-2(c)). Taxpayer, therefore, should have collected sales tax on the repair parts transferred. (IC § 6-2.5-2-1). An exception to the collection requirement is outlined in 45 IAC 2.2-4-2(a). A service provider does not have to collect sales tax on the tangible personal property transferred if:

1. The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
2. The tangible personal property purchased is used or consumed as a necessary incident to the service;
3. The price charged for tangible personal property is inconsequential (less than 10%) compared with the service charge; and
4. The serviceman pays gross retail tax or use tax upon the tangible

personal property at the time of acquisition.

In taxpayer's case, there is no evidence to indicate that the price charged for the tangible personal property transferred was inconsequential (less than 10%) compared with the service charge. Absent compliance with the prescriptions of 45 IAC 2.2-4-2(a), taxpayer should have invoiced and collected the Indiana gross retail tax on all parts and materials used in providing repair services pursuant to IC § 6-2.5-2 and 45 IAC 2.2-4-2.

### **FINDING**

Taxpayer's protest concerning the assessment of sales tax on parts and materials used in repair services contracts is denied.

## **II. Use Tax—Petroleum Storage Tanks**

Taxpayer protests the assessment of use tax on petroleum storage tanks. Taxpayer does not charge customers who use the tanks. And if customers stop purchasing taxpayer's products, they cannot use the tanks. Indiana Code § 6-2.5-3-2 provides for the imposition of a use tax on the "storage, use or consumption of tangible personal property in Indiana." The petroleum storage tanks fall squarely within the ambit of the statutory language. *See also* 45 IAC 2.2-3-4. Taxpayer should have assessed and remitted use tax on the petroleum storage tank transactions.

### **FINDING**

Taxpayer's protest concerning the assessment of use tax is denied.

## **III. Tax Administration—Penalty**

Taxpayer protests the Department's imposition of the 10% negligence penalty, arguing that prior audits have not found anything wrong with the way taxpayer fashions its service and repair contracts.

Indiana Code § 6-8.1-10-2.1(a)(3) authorizes the Department to impose a penalty on a taxpayer if he "incurs, upon examination by the department, a deficiency that is due to negligence." Indiana Administrative Code, Title 45, Article 15, Rule 11-2(b) defines negligence "as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Indiana taxpayers have duties placed upon them by the Code and Administrative Regulations. If a taxpayer is careless or thoughtless, or disregards those duties, negligence results. Further, the Department is authorized to treat ignorance of the "listed tax laws, rules and/or regulations" as negligence.

In determining whether or not to assess the 10% negligence penalty, the Department looks for indicia of negligence as well as for indicia of due diligence. Taxpayer has been doing business within the state of Indiana for many years and is aware of its responsibilities under Indiana's tax code and administrative regulations. Taxpayer has not presented any evidence to support a finding of due diligence. Therefore, the penalty stands.

**FINDING**

The taxpayer's protest concerning the assessment of the 10% negligence penalty is denied.

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